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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1953.

NO. 447

BEARING JOBBERS, INC., M. H. LESCURE and M. M. LESCURE,

Petitioners,

vs.

NICE BALL BEARING COMPANY, a corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Reply Brief of Petitioners.

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UNITED STATES LAW PRINTING CO., CHICAGO 16, ILL. LA KEVIEW 5-6581

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Proceedings in the District Court.

Respondent's brief makes no reference to the unequivocal admissions made by respondent's counsel in the pleadings and at the trial (Petition for Certiorari, pp. 7-9), which removed from the case the issue of the validity of the contract at the time it was entered into. Respondent seeks to avoid these admissions by ignoring them and attempt-

ing to divert the Court's attention to selected excerpts torn out of context, some from the record and some from sources outside the record. These excerpts, when placed in context and there analyzed, do not support respondent's belated assertion that there was a dispute at the trial as to whether the contract was intended to be valid.

The excerpts from pages 85 and 86 of the record (Respondent's Brief, pp. 4-5), to which the Court of Appeals adverted as the sole support for its conclusion as to "the real issue which these parties tried below" (R. 779), clearly refer not to any issue as to whether the contract was valid when entered into but to the issue raised by the pleadings as to whether the contract was executory and hence merely granted to petitioner Lescure an option. This is even more apparent when these passages are placed in context: From the first excerpt, on page 4 of its brief, respondent has conveniently omitted, after the words "that contract", the clause "which is admitted by both sides." (R. 85) And the next excerpt, on page 5 of respondent's brief, conveniently stops short of the statements by both trial counsel for petitioner and the Master that the contract of August, 1931 is "admitted by the pleadings" (R. 86), and of counsel's connected reference on the same record page to unclean hands.

The next three excerpts relied upon by respondent (Brief, p. 5), which are purportedly supported by references to Record pages 825, 826-827 and 827 are not properly in the record before this Court and were not in the record before the Court of Appeals when it decided this case. These record references are to respondent's response to the petition for re-hearing in the Court of Appeals, which in turn quotes from briefs before the Master and the Dis-

trict Court. These quotations, like the first two discussed in the preceding paragraph, are carefully edited and removed from a context which is not available to this Court for scrutiny or to petitioners for argument.

It is enough to say, as to the three latter excerpts, that a reading of the briefs before the Master and the District Court makes it clear that respondent never has attempted, prior to its response to the petition for rehearing in the Court of Appeals, to abandon the admissions made in its pleadings and at the trial and described in the Petition for Certiorari (pp. 7-9).

The last excerpt referred to by respondent (Brief, p. 5), taken from record page 8, is, as even the limited quotation supplied by respondent indicates, a part of an allegation rephrasing the alternative defense of unclean hands which had been presented earlier in the pleadings (R. 63-65).

The issue of unclean hands was based upon the representations of respondent to competitors and customers, both before and after the execution of the contract in question, to the effect that Petitioner M. H. Lescure was the owner of Bearing Jobbers, Inc. The argument proceeded on the proposition that if the representations were false, then respondent was barred by its unclean hands from seeking the aid of a court of equity in undoing one of the steps taken to further the misrepresentations, *i. e.* the placing of the stock in Lescure's name.

While petitioners, in making this argument pointed out that respondent's argument, carried to its logical extreme, required respondent to say the contract was invalid, never-

theless respondent never in fact carried the argument to this extreme, but on the contrary affirmatively admitted the validity of the contract. And, of course, petitioners' entire case was bottomed upon the validity of that contract. That this argument was not intended to and did not affect the admissions of respondent or the issues upon which the case had been tried, is apparent from the later briefs and arguments in the case.

The Appeal.

The opinion of the Court of Appeals amply demonstrates that the issue upon which the case was decided was not argued before that Court.* Petition for Certiorari, pp. 5-6.

Accordingly, the sweeping references by respondent to the briefs filed by the parties in the Court of Appeals is unconvincing, and actually serve only to demonstrate the contrary of the proposition for which the reference is made.

The reference to record pages 908-916 (Respondent's Brief, pp. 6, 7) is to the whole of petitioner's argument to the Court of Appeals on the unclean hands issue. The reference to record pages 955-957 (Brief, pp. 6, 7) is to respondent's argument that the contract in question was not to be "binding" until the happening of a certain event, presumably the payment of the purchase price (see R. 994), which is a different way of saying that Lescure "failed to perform the conditions of said agreement and the said agreement therefore became ineffective", in the words of respondent's Amendment and Supplement to Complaint

*R. 778—Swain, C.J.: "We think that *both the plaintiff and the defendants* in their briefs in this court have over-simplified the question presented by this case." (Emphasis added.)

(R. 28). See also in this connection respondent's brief, pp. 4-5, referring to record pages 85 and 86, also referred to by the Court of Appeals. These issues are wholly different from the one on which the Court of Appeals based its decision, *viz.*, "whether there was any valid written contract made between Nice and Lescure" (R. 779), and respondent's reliance upon them for proof that the latter issue was tried only demonstrates that such proof is lacking.

A convincing answer to respondent's contentions as to the arguments made on appeal is that the only support which the Court of Appeals could find for its assertion that the issue admitted out of the case was the one "which these parties tried below" were the statements on pages 85 and 86 of the record, discussed in the second paragraph of this reply brief.

Respondent's Argument (Brief, pp. 7-9).

Respondent's reliance on the undisputed rule that a judgment which is correct will be affirmed by the Court of Appeals, even though the trial court relied upon the wrong ground (Respondent's Brief, pp. 7-8), is misplaced. While it will appear from an exposition of the whole case that the judgment of the trial court cannot be sustained on any ground, it is enough here that the sole ground for the decision of the Court of Appeals was that Court's determination of an issue that had been admitted out of the case and therefore not tried by the parties. In deciding the case on this ground, the Court of Appeals so gravely erred as to require the exercise of this Court's supervisory power (*Helis* v. *Ward*, 308 U.S. 365) and denied petitioners due process in violation of the Fifth Amendment (*Saunders* v. *Shaw*, 244 U.S. 317). See Petition for Certiorari, pp. 11-15.

It would be inappropriate for petitioners to burden the Court now with any discussion of the merits in refutation of respondent's assertion that the decision of the Court of Appeals is correct "for other reasons" than the one relied on by that Court. It is sufficient to say that the evidence is not "very plainly to the effect" stated by respondent (Brief, p. 8), and that, on the contrary, if petitioners received the appellate review to which they are entitled, the judgment of the District Court would be reversed.

CONCLUSION.

Respondent's entire brief consists of an attempt to make it appear that the issue of whether the contract of August 7, 1931 was valid when entered into was litigated. That this is a calculated attempt to mislead this Court is demonstrated by respondent's failure to so much as mention in that brief the unequivocal admissions in respondent's pleadings and at the trial (pointed out in the Petition for Certiorari, at pp. 7-9) that the contract in question was a valid contract.

Such silence is tantamount to an admission that the issue upon which the Court of Appeals based its decision was neither pleaded nor tried and accordingly that petitioners were denied substantive rights under the Fifth Amendment to the Constitution of the United States.

Respectfully submitted,

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